IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE

FIRST APPEAL NO.1840 OF 2005
WITH
CIVIL APPLICATION NO.4167 OF 2005

Shantilal Mulchand Jain ..Appellant.
Vs.
Municipal Corporation of Greater Bombay ..Respondent.
...
Mr. Deepak Trivedi for the Appellant.
Ms. Geeta Joglekar for the BMC.
...

CORAM : DR.D.Y.CHANDRACHUD, J.

17th November, 2005.

P.C. :

1. Admit. Counsel appearing for the Respondent waives service. By consent taken up for hearing and final disposal.

2. This appeal arises out of a judgment and order dated 18th July, 2005 of the City Civil Court dismissing a suit for declaration instituted by the Appellant and inter alia seeking to challenge the legality of a notice issued by the Municipal Corporation and an order of the Deputy Municipal Commissioner. The Municipal Corporation and, after trial, the Trial Court, came to the conclusion

that a G. I. Sheet shed admeasuring 11 ft. x 7 ft. on the fourth floor of the open terrace of a building situated at 46, Vithalwadi, Mumbai 400 002 is unauthorized.

3. During the course of the trial, the evidence of the Plaintiff/ Appellant came to be recorded. The Appellant had moved a Chamber Summons (Chamber Summons 225 of 2005) seeking permission to adduce additional evidence which according to the Appellant had a bearing on the question as to whether the structure in question had been constructed prior to the datum line of 1st April, 1962. The Appellant sought to lead additional evidence for the purposes of proving five pieces of documentary evidence referred to in paragraph 5 of the affidavit in support of the Chamber Summons; these being as follows :

"1. Original copy of rent bill of Ramsubhkarni Prasad dated 1.11.1960.

2. Original Agreement of sub-tenancy dated 9.11.1960.

3. Original letter dated 4th April 1960 from the plaintiff asking permission to repair the premises.

4. Original copy of the notice under Section 354 of BMC Act bearing No.C2/ 504 of 1959-60 dated 4.2.1960 issued by the City Engineer, BMC to carry out repairs.

5. Original copy of Asst. Engineer's letter No.ABC/2/567/1960-61 permitting the Plaintiff to repair the premises."

4. The Chamber summons was dismissed by the Learned Trial Judge on 28th March, 2005 holding inter alia that upon the deletion of the provisions of Order 18 Rule 17-A of the Code of Civil Procedure, 1908, there was no subsisting provision for recalling a witness where documents have not been produced despite the exercise of due diligence and care. The order of the Learned Trial Judge was challenged in a writ petition under Article 227 before this Court and Mr. Justice S.A. Bobde, by his order dated 6th July, 2005 held while disposing of Writ Petition 3793 of 2005 that it would be open to the Appellant to raise the ground raised in his writ petition in a substantive appeal against the final judgment and decree of the Trial Court.

5. In paragraphs 9, 10 and 11 of the final judgment and order of the Trial Court in the suit there is a discussion in respect of the aforesaid documents upon which reliance was sought to be placed by the Appellant. The Trial Court has held that what was produced at that stage was only photocopies and that there was

no application to adduce secondary evidence. In the circumstances, the Court declined to take cognizance of the aforesaid documentary material on the ground that it has not been duly exhibited in evidence.

6. As noted above, the Appellant had in a Chamber Summons before the Trial Court sought to lead additional evidence since it was his case that originals of the aforesaid documentary material have since been traced. In the affidavit in support of the Chamber Summons, it was stated that the Plaintiff has been diagnosed as suffering from Cancer and that he was taking Chemotherapy. In the circumstances, the suit was being looked after by the brother of the Plaintiff who was also acting as his Constituted Attorney. The original of the documents, it was stated, had since been obtained from the Plaintiff.

7. This being the position, it would be only just and proper to allow the Appellant an opportunity to lead additional evidence for the purposes of producing and exhibiting the aforesaid documents adverted to in paragraph 5 of the affidavit in support of the Chamber Summons on the record of the Trial Court. In

Salem Advocates Bar Association v. Union of India - 2005 (5) All. MR (S.C.) 876, the Supreme Court held that the deletion of order 18 Rule 17-A which provided for leading additional evidence would result in the restoration of the legal position as it stood before the introduction of the amendment. The Supreme Court held that before the insertion of Order 18 Rule 17-A the Court had an inherent power to permit the parties to lead evidence not known to them earlier or which could not be produced in spite of due diligence. In that sense Order 18 Rule 17-A did not create any new right but was only clarificatory of the existing position. Consequently, the deletion of the provision would not disentitle a party from producing evidence at a later stage subject to the Court being satisfied that the evidence was not within the knowledge of the party despite the exercise of due diligence or that it could not be produced at the time of evidence.

8. In the present case, sufficient grounds have been set out to justify the non-production of the documents at the stage when the evidence was initially led on behalf of the Plaintiffs. In that view of the matter, it would be appropriate to allow this Appeal and to remand the proceedings back to the Trial Court for fresh disposal

after granting to the Appellant an opportunity of leading evidence to prove the documents adverted to in paragraph 5 of the affidavit in support of Chamber Summons 225 of 2005. In order to facilitate this process, the order dated 18th July, 2005 is quashed and set aside. L.C. Suit 1823 of 1993 shall accordingly stand restored to the file of the City Civil Court for fresh disposal. The Learned Trial Judge is requested to grant to the Appellant an opportunity of leading additional evidence to prove the documents adverted to herein above. The Court is informed by counsel appearing for the Appellant that during the pendency of the suit, an interim protective order continued to govern the proceedings. In the event that this be so, the interim order shall stand revived and continue to operate until the suit is disposed of by the Trial Court. The Appeal is accordingly disposed of. There shall be no order as to costs.

9. Parties shall appear before the Learned Trial Judge for receiving further directions in this matter on 12th December, 2005, so that a time schedule can be set down for the disposal of the matter.

10. In view of the disposal of the First Appeal, the Civil Application is rendered infructuous and is accordingly disposed of.